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No. 89-110

In The

Supreme Court of the United States

October Term, 1989

THOMAS ENGLERT, D/B/A NORTHEAST ELECTRICAL INSPECTION AGENCY,

Petitioner,

vs.

CITY OF McKEESPORT and MIDDLE DEPARTMENT INSPECTION AGENCY,

Respondents.

BRIEF OF RESPONDENT CITY OF McKEESPORT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether, absent a showing of a contract, combination or conspiracy, a city may be found to have violated the Sherman Act when that city designates a private company to perform electrical inspections on buildings for which an occupancy permit is sought.

2. Whether, a city is exempted from Sherman antitrust liability when, pursuant to clearly articulated state policy, a private company is designated as that city's electrical inspector and the work performed by that inspector is reviewed before the issuance of an occupancy permit.

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Respondent City of McKeesport respectfully requests that this Court deny the Petition for Writ of Certiorari, seeking review of the Third Circuit's opinion in this case. That opinion is reported at 872 F.2d 1144 (1989).

REASONS WHY THE PETITION SHOULD BE DENIED

Respondent City of McKeesport concurs with the listing of parties, the opinions of the Courts below, the Statement of Jurisdiction, the Statutes involved, and the

Statement of Facts as set forth in Thomas Englert's Petition for a Writ of Certiorari, with two exceptions.

On Page 5 of said Petition, the Petitioner avers "that McKeesport places no restrictions, on, and does not otherwise regulate or control, the fees or prices charged by MDIA, which are entirely paid by the electrical contractors and are retained by MDIA." This statement is somewhat misleading. Although McKeesport does not set the fees charged by MDIA and does not receive a portion of the fees collected, McKeesport does supervise the conduct of MDIA by reviewing the electrical inspections performed by MDIA.

On Page 6 of the Petition, the Petitioner avers that "McKeesport officials had discussed the proposed resolution with the MDIA inspector assigned to the geographic area encompassing McKeesport, who was present at the meeting at which the resolution was formally adopted." The discussion that McKeesport had with the MDIA inspector was in the nature of an inquiry as to its procedures.

A. THE COURT OF APPEALS CORRECTLY DETERMINED THAT THE PETITIONER DID NOT PRESENT EVIDENCE THAT WOULD SHOW A CONTRACT, COMBINATION OR CONSPIRACY AS REQUIRED BY THE SHERMAN ACT. 15 U.S.C. §§ 1-2.

The Court of Appeals correctly decided this case on the grounds that Englert was unable to produce any evidence that the City of McKeesport and Middle Department Inspection Agency ("MDIA") conspired to create a

monopoly or that the acquisition of a monopoly by MDIA was willful.

Section 1 of the Sherman Act requires that a Plaintiff must produce evidence that there was a "contract, combination or conspiracy" in restraint of trade or commerce. The Court of Appeals, in determining that Englert had failed to carry the burden of proof required under Section 1 of the Sherman Act, correctly cited and applied an opinion of this Court in *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752 (1984), which stated:

> [t]here must be evidence that tends to exclude the possibility that the [defendants] were acting independently. As Judge Aldisert has written, the anti trust plaintiff should present direct or circumstantial evidence that reasonably tends to prove that the [defendants] 'had a conscious commitment to a common scheme designed to achieve an unlawful objective'.

465 U.S. at 764, (quoting *Edward J. Sweeney & Sons, Inc., v. Texaco*, 637 F.2d 105, 111 (3rd Cir. 1980), *cert. denied*, 451 U.S. 911 (1981)).

B. THE COURT OF APPEALS CORRECTLY FOUND A "HYBRID RESTRAINT" ANALYSIS TO BE INAPPLICABLE IN THIS CASE.

Englert, having failed to prove concerted activity between McKeesport and MDIA, asks that the enforcement of the Resolution at issue be characterized as a "hybrid restraint" of the type mentioned in this Court's opinion in *Fisher v. City of Berkeley, California*, 475 U.S. 260 (1986).

This Court did find hybrid restraints that violated the Sherman Act in *Schwegmann Brothers v. Calbert Distillers Corp.*, 341 U.S. 384 (1951), and *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980).

Both *Midcal* and *Schwegmann Brothers* concerned price fixing schemes by groups of private individuals. The issue in these cases was whether the state statutes that authorized the conduct would insulate the liability of the private actors from the Sherman Antitrust Act.

In the present case there is no evidence of concerted activity and thus the Court of Appeals was correct in finding no hybrid restraint.

C. THE CITY OF McKEESPORT IS EXEMPT FROM LIABILITY UNDER THE SHERMAN ACT.

In *Parker v. Brown*, 317 U.S. 341 (1943), this Court held that the Sherman Act, 15 U.S.C. §§ 1-2, was inapplicable to certain types of "state action". In *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980), this Court set forth the appropriate requirements which trigger the "state action" exemption. Specifically, a challenged restraint must be "one clearly articulated and affirmatively expressed as state policy", and, also the policy must be actively supervised by the [state] itself.

The City of McKeesport meets both of the requirements for *Parker v. Brown* immunity. As to the state action requirements, the City of McKeesport is a Third Class City which has adopted the Home Rule form of government. In proceeding as a Home Rule Charter Community, the City is guided by the Home Rule Charter and

optional plan law. 53 Pa. C.S.A. § 1-101 et seq. of particular significance is the section set forth at 53 Pa. C.S.A. § 1-401. In its relevant part, § 1-401 states as follows:

> "Upon the adoption by the qualified voters of any municipality of any of the optional plans of government as set forth in this act, the municipality shall thereafter be governed by the plan adopted and by the provisions of general law applicable to that class or classes of municipality except as otherwise provided herein. Unless until the municipality should adopt another form of government as provided by law, the plan adopted and the provisions of general law applicable to that class or classes of municipality shall become law in the municipality at the time fixed by this act . . . "

On May 5, 1982, pursuant to a properly enacted resolution by City Council, the City of McKeesport named MDIA as electrical inspector for the City of McKeesport. These actions were taken pursuant to provisions of the Third Class City Code, 53 Pa. C.S.A. § 35101 et seq., and, specifically, 53 Pa. C.S.A. § 39132, which states as follows:

> "Council may appoint building inspectors, housing inspectors, fire prevention inspectors, *electrical inspectors*, and plumbing inspectors and fix their compensation. Such inspectors shall have the right to enter upon and inspect any and all premises at all reasonable hours for the administration and enforcement of the building ordinance, the housing ordinance, the fire prevention ordinance, the electrical ordinance and the plumbing ordinance. Any fees payable to them under the building ordinance, the housing ordinance, the fire prevention ordinance, the electrical ordinance and the plumbing ordinance

> shall be paid by them to the city treasurer for the use of the city as promptly as may be.

Inasmuch as the state statute under which the City is proceeding has never been challenged to determine the propriety of the legislation, the "policy" of the Commonwealth of Pennsylvania as relates to the appointment of an electrical inspector is unmistakable. Therefore, it is clear that the City of McKeesport has met the state action requirement for the *Parker v. Brown* exemption from antitrust liability.

The second requirement necessary to satisfy "state exemption" of a municipality from antitrust liability concerns the concept of "active supervision" within the meaning of that term as developed in *Midcal, supra.*

This Court specifically addressed the active supervision requirement as it applies to municipalities in *Town of Hallie v. City of Eau Claire*, 471 U.S. 34 (1985). In *Hallie*, this Court stated that "the active state supervision requirement should not be imposed in cases in which the actor is a municipality." *Id*, 471 U.S. at 46. This Court essentially held that for purposes of supervision the municipality displaces the state. *Id.*

In the present case the City of McKeesport is the actor. In order to serve the interest of its citizens, the City has chosen to appoint MDIA as electrical inspector and it is a challenge to this action that forms the gravamen of Englert's complaint.

If this Court finds that active supervision is necessary in the present case, then the City certainly meets this requirement.

If this Court finds that active supervision is necessary in the present case, then the City certainly meets this requirement.

All inspections performed by MDIA are reviewed by the City before services are provided by the appropriate utility company. This is accomplished through the use of filing cards indexed with the City of McKeesport Clerk. Before the issuance of an occupancy permit, the cards are reviewed to make certain that the inspected building meets code standards.

CONCLUSION

For all of the reasons stated above it is respectfully requested that the Petition for a Writ of Certiorari be denied, inasmuch as the decision of the United States Court of Appeals for the Third Circuit in *Thomas Englert, d/b/a Northeast Electrical Inspections Agency v. City of McKeesport and Middle Department Inspection Agency*, 872 F. 2d 1144 (1989), is correct.

Respectfully submitted,

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